Supreme Court, U.S.
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Docket No. 10-678

In The
SUPREME COURT OF THE UNITED STATES

GREGORY S. HOLLISTER, et al.,

Petitioner

v.

BARRY SOETORO, et al.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court follow the rule that a complaint should not be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief?"

2. Did the District Court examine the complaint of the plaintiff/petitioner Hollister as required by the decisions of this and every other federal court to see if it alleged facts to support its claims?

3. Did the district court examine the words "or being under any obligation written or unwritten in the amount of $500 or more..." as set out disjunctively at the end of 28 U.S.C. § 1335(a) as they pertain to the plaintiff/petitioner Hollister as a member of the Individual Ready Reserve?

4. Did the district court violate the clear language standard for statutory interpretation?

5. Did the district court, as affirmed by the appellate court, examine and apply the *de facto* officer doctrine as required?

6. Did the district court, as affirmed by the appellate court ignore the Nuremburg principle IV as amplified by the Statute of Rome and improperly fail to analyze the ability of the defendant Obama to give a lawful order under that principal under the allegations of the complaint?

7. By refusing to consider the issue of the defendant Obama not being a "natural born citizen" as set out in Article II, Section 1, Clause 5 of the Constitution did the district court violate its obligation to consider the issues raised by the complaint?

8. Did the district court, as affirmed by the appellate court, take into account the equitable nature of Interpleader when there is no remedy at law?

9. In failing to consider and ignoring the law set out in 1 through 8 above, and instead relying upon extrajudicial criteria such as an assertion that: "The issue of the President's citizenship was raised, vetted, blogged, texted, twittered, twittered, and otherwise massaged by America's vigilant citizenry during Mr. Obama's two year campaign for the presidency,..." combined with an attack on the petitioner plaintiff because he "wants it resolved by a court," and that one of the counsel involved in signing the pleadings for the petitioner/plaintiff, a well known Pennsylvania Democrat politician and prominent Hillary Clinton supporter in that state during the primaries, who was attacked by the district court as an "agent provocateur" and also with sarcastic attacks on the plaintiff/petitioner Hollister, did the district court not engage in such obvious political bias based upon extrajudicial factors as to render its opinion void?

10. Did the district court seek to deny petitioner Hollister his constitutional right of access to the courts.

11. Did the U. S. Court of Appeals for the District of Columbia Circuit adopt that bias so as to render its affirmation of the district court also void?

12. Did the Court of Appeals, in so adopting the bias of the district court, cite this Court's opinion in *Liteky v. United States*, 510 U.S. 540 (1994) for the opposite of what it holds in an attempt to rationalize its adoption of the bias?

13. Did the Court of Appeals erroneously apply the case law, including its own, in holding that the petitioner/plaintiff and petitioner/counsel could not invoke 28 U.S.C. § 455 at the appellate level?

14. Did the evident bias engaged in below lead to a decision which ignored the law as set out above and as a result place the respondent/defendant Obama above that law and the rule of law in this country generally and threaten the constitutional basis and very existence of our rule of law?

15. Did the courts below not completely ignore the decisions of this court and the clear language of Rule 15 of the Federal Rules of Civil Procedure concerning amendments so as to compound its biased elevation of the defendant Obama above the rule of constitutional law?

16. Did the courts below fail to analyze and apply the *Bivens* doctrine as part of placing the defendant Obama above the rule of law in destruction of the Constitution as the basis of that rule of law?

17. In so placing the defendant Obama above the rule of law and failing to analyze the claims of the complaint and the facts it alleged, did the court of appeals below err in not considering relevant and take judicial notice of the Hawaiian territorial statutes in effect in 1961 and the other matters which the petitioners Hollister and Hemenway sought judicial notice on?

18. Did the courts below create a constitutional rule of law crisis in this country by refusing to consider the intent of the founders in placing the phrase "natural born citizen" in the Constitution as an eligibility requirement for a person to be President?

19. Did the appellate court seek to prevent the public from noticing the harm it was doing to the constitutional rule of law in this country by refusing to publish its opinion on a matter which addressed the very legitimacy of the nation's Commander–in–Chief?

20. Did the district court, as affirmed, properly assess a Rule 11 sanction against the petitioner/counsel Hemenway in light of the case law of this Court, particularly in the 19th Century and the relevant discourse evidencing the framers' intent at the time of the founding?

(b) PARTIES : CORPORATIONS

The parties are: The petitioner Col. Gregory S. Hollister, who was the plaintiff in the district court, his attorney, the petitioner John D. Hemenway, who was sanctioned in the district court under Rule 11 for bringing suit, and the defendants in their capacities as set out in the caption. There are two defendants: the first is the respondent Barry Soetoro a/k/a Barack H. Obama, who is an interpleader and Bivens defendant and Joseph R. Biden, Jr., who is also an interpleader and Bivens defendant. There are no corporations involved so as to require disclosure.

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REPORTS

(d) The dismissal opinion by the district court to which this petition is addressed was reported as *Hollister v. Soetoro*, 601 F.Supp.2d 179 (D.D.C.2009) The reduced Rule 11 sanction Memorandum and Order to which this petition is addressed was reported as *Hollister v. Soetoro* at 258 F.R.D. 1 (D.D.C.2009). The Court of Appeals refused to publish its opinions, denying a motion to publish.

STATEMENT OF JURISDICTION

(e)(i) The order for which review is sought was filed on March 22, 2010. (e)(ii) Rehearing was denied August 23, 2010. (e)(iv)This Court, petitioner believes, has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Constitution: Art. II, Sec. 1, Cl. 5; Art. I, Sec. 8, Cl. 4; Nuremberg Convention, Principle IV; Rome Statute of 1998, foundation of International Criminal Court: Art. 33; 28 U.S.C. §§ 1331, 1335; Rule 22, Fed. R. Civ. P.; 10 U.S.C. § 892, Art. 92; 10 U.S.C. §§ 10101, 10102, 10103, 10110, 10205; Immigration and Nationality Act, § 301(a)(7), Pub. L. No. 414, 66 Stat. 163, 236 (June 27, 1952) (codified at 8 U.S.C. § 1401(a)(7); Chpt. 57, VITAL STATISTICS, REVISED LAWS of HAWAII 1955, Part 1, TERRITORIAL PUBLIC HEALTH STATISTICS ACT; Fed. R. Civ. P. 15. See appendix for text of each.

STATEMENT OF THE CASE

Petitioner Hollister retired honorably from the Air Force as a Colonel after a full career. He became concerned because of evidence that had surfaced in the media of the Internet that the respondent Obama had run for and obtained the office of President *de facto* but not *de jure* so as to be able to give lawful orders as Commander in Chief under the Constitution. Colonel Hollister is a member of the Individual Ready Reserve whose skills could well be needed given the current state of the war in which the United States is engaged. APPX 67 ff

If Congress called up the Air Force Individual Ready Reserve the respondent Obama would have to give the order and then give orders as to deployment and otherwise. If, as it appears, those orders would not be lawful, Colonel Hollister would be bound in light of the Nuremberg Convention and the Rome Statute establishing the International Criminal Court to question them and look to the respondent Biden as constitutionally next in succession, for lawful orders. The respondent Obama would not be an officer capable of giving such orders *de jure* under the doctrine established by this Court.

Because of these concerns and his obligation as a member of the Individual Ready Reserve, petitioner Hollister brought suit against the respondents Obama and Biden in the district court, invoking the Interpleader statute and Federal Rule of interpleader as they incorporate the common law of interpleader and provide for suit in the nature of

interpleader as well, relying in particular upon the plain language of the statute in its use of the word "obligation" and suing the respondents in their various capacities and, in the case of the respondent Obama, the alternative name he had used and been given for a portion of his life and never changed. APPX 44 ff

The respondents moved to dismiss. The district court found that it had jurisdiction of the case, and therefore that petitioner Hollister had standing because of the Interpleader act but dismissed pursuant to Rule 12(b)(6) for failure to state a claim. In its analysis of Hollister's claim, the district court did not (and subsequently stated affirmatively that it would not,) examine the central element of the claim, namely whether respondent Obama was a "natural born citizen" in the language of Art. II, Sec. 1, Cl. 5 of the Constitution.

Instead, in analyzing whether, in its opinion, the petitioner Hollister made out a claim, the district court focused exclusively on the concept of "property" as addressed in the Interpleader Act. In so doing the district court ignored the concept of "obligation" as stated clearly, disjunctively, in the act despite petitioner Hollister's claims of his duty being at stake. The district court focused on what interpleader was typically used for in its opinion rather than focusing on the claims of petitioner Hollister under the clear language of the Act to see if he could prove any set of facts to prove his claim. APPX 3

Thus the district court did not consider whether there was any set of facts that the petitioner

Hollister could show that would support his claims and instead focused upon one of his claims and ignored others and refused to consider the central issue of whether or not the respondent Obama a/k/a Soetoro meets the requirement of the Constitution. In refusing to examine the constitutional presidential eligibility requirement, the district court ignored petitioner Hollister's concern in his complaint of whether if called up from the Individual Ready Reserve he would be in the position of having to obey orders from a purported Commander in Chief who was *de jure* and, who, therefore, could not give lawful orders under the Uniform Code of Military Justice and who would, therefore, put the petitioner in the position of not being able to fully comply with the Nuremburg principles as amplified by the Statute of Rome.

While the motion to dismiss was pending, less than 21 days after it was filed, petitioner Hollister filed an amended complaint adding a *Bivens* count. APPX 72 ff In dismissing the district court made no mention or analysis of the amended complaint and failed to analyze or decide upon the *Bivens* count. It decided it would not allow amendment without analysis or reasoning, ordering the respondents not to reply to it. APPX 19

While ignoring the claims of the petitioner Hollister as described above the district court engaged in and based its decision upon quite palpable bias. The most striking of these exhibitions of overt bias was the reliance upon the factor: APPX 1

> The issue of the President's citizenship was raised, vetted, blogged, texted, twittered, and otherwise massaged by America's vigilant citizenry during Mr. Obama's two year campaign for the presidency, but this plaintiff wants it resolved by a court.

Thus the district court exhibited in this observation a bias based on a completely extrajudicial factor, and one that elevates popular will above the rule of law, but also quite gratuitously reinforced the bias by assaulting the petitioner Hollister for seeking to have the constitutional rule of law applied and thus from having access to the courts that exist to protect that constitutional rule of law.

> A further example of this bias based on extrajudicial factors by the district court was its observation that a lawyer associated with the initiation of petitioner Hollister's case, a prominent Democrat in Pennsylvania who backed Hillary Clinton in her successful primary there against respondent Obama, though never admitted in the case, was "probably" the "real plaintiff" in the case and that he and another lawyer who signed filings but was also never admitted,, his colleague, were "*agents provocateurs*" whose efforts to raise the issue of the respondent Obama's constitutional eligibility in law suits were a crusade in which the petitioner Hollister was a dupe, a "straw plaintiff." APPX 1-2

> The district court further exemplified this bias by referring to the petitioner Hollister, whose Air Force papers proving what he said about being an Air Force veteran who was in the Individual Ready

Reserve were attached to and incorporated into the complaint, sarcastically as one "says that he is retired Air Force colonel who continues to owe fealty to his Commander–in–Chief...." Thus the district court did not take the allegations of the complaint as true and indulged in biased sarcasm to belittle petitioner Hollister. APPX 1

Finally, although it had not, as pointed out, actually fully examined the claims of the petitioner Hollister, the district court decided that the attorney of record for the petitioner Hollister, John D. Hemenway, because as the district court said, it had already twice found the case to be "frivolous," should be sanctioned under Rule 11 and made to pay the entire counsel fees of the lawyers for the respondents Obama and Biden, which, according to public records at the Federal Election Commission, would be hundreds of thousands of dollars. The District Court issued a Show of Cause for attorney Hemenway to show why he should not be made to pay the said legal fees. APPX 4 It is further evidence of the bias based in extrajudicial factors the way that this was set out, particularly since under Rule 11 a judge acting on his own initiative is prohibited from assessing such a penalty. In so doing the district court made no effort and indeed showed no interest in finding out what the pre-filing inquiry engaged in had been.

Attorney/petitioner Hemenway then filed a Show of Cause showing, *inter alia*, that Rule 11 did not permit the assessment of such a monetary sanction by a judge on his own volition and that there was precedent in the opinions of this Court for believing that the respondent Obama did not

meet the constitutional eligibility requirement. He demanded a hearing on the sanctions and requested discovery. The district court then issued a second opinion in which it backed off of the monetary sanction and instead imposed a non monetary reprimand upon attorney/petitioner Hemenway under Rule 11. APPX 6 ff Again, in doing so the district court made no inquiry into what the pre–filing inquiry had consisted of and ignored that basic principle of Rule 11 law as far as its actual analysis although it mentioned that pre-filing inquiry is in fact the fundamental principle of Rule 11 law even as it failed to look for any such inquiry.

In this opinion in which it downsized its Rule 11 sanction (AAPX 6 ff) the district court further illustrated its extrajudicial bias about the case. For example it referred to many people being interested in the eligibility question, remarking sarcastically that maybe it was as many as a "couple of dozen." In fact reliable polls, even by media that worships the respondent Obama, have shown the number of such people to be in the tens of millions and growing despite considerable attempts at suppression and ridicule. In this second opinion the district court further illustrated its extrajudicial bias by referring again pejoratively to the Hillary Clinton–supporting attorney and political figure Philip J. Berg and even giving the URL for the latter's web site (APPX 18) and remarking that Berg was seeking modest donations, implying that Hemenway was but a dupe of Berg.

In this second opinion the district court said it was not discussing the merits, having already

decided that there was no claim under Rule 12(b)(6). APPX 9 It nonetheless engaged in analysis of cases on property again and though it mentioned duty did not discuss the concept of "obligation" APPX 9 ff as expressed in the clear language of the Interpleader Act. In a further indication of bias it gratuitously compared Colonel Hollister, who was on active duty in the Air Force when President Reagan ordered the bombing of Libya to the Libyans under Qadaffi who sought to sue Reagan and his successor in office for carrying out that attack. APPX 15-6 That, of course, was a case involving a direct assault upon the concept that such actions are part of a President's foreign policy prerogative and that case had nothing to do with interpleader.

The present petitioners then separately appealed from the decisions of the district court to the United States Court of Appeals for the District of Columbia Circuit. The petitioner/plaintiff Hollister first appealed the district court's dismissal of his suit and the petitioner/attorney Hemenway then appealed the Rule 11 sanction levied against him. The Court of Appeals joined the two appeals.

In the appeals court the appellant there, attorney/petitioner Hemenway formally moved for judicial notice of, *inter alia*, the Hawaiian territorial statutes concerning health records in effect when the respondent Obama was born and unusual occurrences in the certifying of Obama's nomination. The appeals court denied all judicial notice requests on grounds of irrelevance. APPX 22

The appeals court denied the appeal without comment, affirming without analysis. APPX 21-2 It denied any bias. Hollister and Hemenway petitioned for reconsideration and asked for a hearing *en banc*. They also moved for the recusal of the district court judge for his bias and the vacation of his judgments because of that bias pursuant to 28 U.S.C. § 455. APPX 110 ff The appeals court denied the recusal motion. In the meantime the attorney Philip J. Berg, while the case was in the Court of Appeals, who had never been admitted, withdrew from representing the petitioner/plaintiff Hollister. So also did his colleague Lawrence J. Joyce of the Arizona bar, who had been admitted at the appellate level.

The appeals court denied reconsideration and an *en banc* hearing without analysis. APPX 23-4 The appeals court approved of everything done by the district court without additional analysis. This petition follows.

ARGUMENT

I. The failure to follow *Conley v. Gibson*

In arriving at its decision in this case the district court so far departed from the rule set down by this Court in *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 102-03, 2 L.Ed.2d 80 (1957) which has become the accepted and usual course governing proceeding in every federal court, including those involved in these decisions, in a question of such national significance, namely the eligibility of the man occupying the oval office to be in that office and be the President, that the exercise of this Court's

supervisory power is called for. Moreover, this departure from the accepted and usual course of judicial proceedings was based, as is seen by the district court's statements, upon extrajudicial factors indicative of bias, albeit that bias was also indicated and reinforced by comments upon matters that were not extrajudicial.

The rule set out in *Conley* which was not applied in this case is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-6, 78 S.Ct. at 102. The district court did not examine the set of facts that could have supported the claim of the plaintiff that he had an "obligation" as that term is used as clear language in the federal interpleader statute. He clearly alleged in his complaint that he had such an obligation. Yet the district court, in its analysis, focused exclusively on concepts of "property" as that term is used in the federal interpleader statute and failed to analyze whether the plaintiff Hollister had stated a claim because of the "obligation" that he has as a member of the Air Force Individual Ready Reserve

In doing so the district court violated another rule set down in the decisions of this court which is now also the accepted and usual rule governing proceedings in the courts. That rule is the plain meaning rule. This Court has expressed it thusly: "We give the words their natural significance unless that leads to unreasonable results plainly at variance with the evident purpose of the legislation." *City of Lincoln, Neb. v. Ricketts*, 297 U.S. 373, 376,

56 S.Ct. 507, 509, 80 L.Ed. 724 (1936), citing *Ozawa v. United States*, 260 U.S. 178, 180, 194, 43 S.Ct. 65, 67 L.Ed. 199, *Ohio v. Helvering*, 292 U.S. 360, 370, 54 S.Ct. 725, 78 L.Ed.1307. See also *Helvering v. Hammel*, 311 U.S. 504, 510-11, 61 S.Ct. 368, 371, 85 L.Ed. 303 (1941). There this Court amplified the plain meaning rule further. It made clear that the plain meaning of language in a statute must be adhered to as the intent of the legislature unless (a) lead to absurd results, citing *United States v. Katz*, 271 U.S. 354, 362, 46 S.Ct. 513, 516, 70 L.Ed. 986, or (b) the plain meaning would "thwart the obvious purpose of the statute," citing *Haggar v. Helvering*, 308 U.S. 389, 60 S.Ct. 337, 84 L.Ed. 340. "...courts are not free to reject that meaning where,...,no such consequences follow, and,...it appears to be consonant with the purposes of the statute." *Id.*

The district court in this instance completely failed to examine the disjunctive phrase contained in the federal interpleader statute concerning the word "obligation" and examine its plain meaning and thus failed to assess the ability of the plaintiff/petitioner Hollister to prove that he had such an obligation. The disjunctive phrase in question is the last one in 28 U.S.C. § 1335(a). Further, attached to the complaint as filed, as its first attachment, and incorporated into it, was Col. Hollister's discharge form worksheet DD FORM 214. APPX 67 ff This form shows that Col. Hollister served honorably (item 24) and took voluntary retirement (item 23) after a full career (item 28). It also shows (item 14) that he is "Subject to Recall..." Thus it must be inferred that he is as he alleges in his complaint a member of the Individual Ready Reserve. The district court mockingly failed to, as required by

another universal standard established by this Court, accept for purposes of a dismissal motion the allegations of the complaint as true and draw inferences in Colonel Hollister's favor. A court must, "with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328, 127 S.Ct. 2499, 2509, 168 L.Ed.2d 179 (2007), citing *Leatherman v.Tarrant County Narcotics and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

Secondly, also ignored by the district court here, the court "...must consider the complaint in its entirety, as well as other sources courts ordinarily consider in when ruling on 12(b) (6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.* (citing Wright & Miller § 1357 (3d ed 2004 and Supp 2007)). *Id.* That accepted and universal standard was ignored here as well as the third principle of considering inferences in plaintiff's favor in the full context.

Instead of taking what was alleged as true and considering the attachment of Col. Hollister's discharge form in proper context, considering the allegations and exhibits in full context at all the district court indulged in a bit of gratuitous sarcastic insult of Colonel Hollister, reflecting its bias based on extrajudicial factors which we discuss further further on. Instead of properly considering and inferring, the district court questioned whether or not Col. Hollister is a retired Colonel, indicating that "...the plaintiff says that he is a retired Air Force

colonel..." as if there were any doubt that Col. Hollister is what he alleged, a retired Air Force colonel who is a member, in retirement, of the Air Force Individual Ready Reserve.

Further, the district court here failed to assume that the general factual allegations of the complaint concerning matters of the lack of constitutional eligibility of the respondent Obama embraced those specific facts that are necessary to support the claims. For example, the general allegation of the respondent Obama's use of a misleading document to supposedly prove his birth in Hawaii embraces the facts that the plaintiff Hollister would develop to show beyond a doubt that the document referred to was not an actual birth certificate as a specific fact. This violates the universal rule set down by this Court. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2135, 119 L.Ed.2d 351 (1992).

II. The *de facto* officer doctrine

Many years ago, in the 19th century, this Court set out the concept of the federal office holder who is *de facto*, but not *de jure*. This Court set out this concept of the *de facto* officer and its early development of the concept in the more recent decision in *Ryder v. United States*, 515 U.S. 177, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995). To be *de jure* an officer and his acts must have come into being because of the "appointment or election of the officer" being in accord with the Constitution. Under the *de facto* concept the acts of the officer are still upheld even though it is later discovered, after the fact, that the appointment or election of the

officer was constitutionally deficient. In Ryder, a Coast Guardsman who was under prosecution within the Coast Guard legal system was able to disqualify an appellate panel within that system as being constitutionally deficient and thus void its decision against him because he raised the issue of the members of the appellate panel being not *de jure* but only *de facto* before the panel made its decision in his case. And so here the plaintiff Hollister directly addressed the issue of the respondent Obama being not *de jure* but only *de facto* from the outset of his case, addressing the issue even in the captioning of his case and thus well before any decision to recall him to active duty as a member of the Individual Ready Reserve. Yet, again, the district court refused to see and neglected to examine the issue that the respondent Obama was not *de jure* as alleged in the complaint to be proven by the development of facts to support that claim.

III. The failure to examine the central issue

Most importantly, however, the district court did not and would not examine the central question of the complaint, whether or not the respondent Obama meets the constitutional eligibility requirement to be President as that requirement is set out in Article II, Section 1, Clause 5 of the Constitution in that it requires that, after the passing away of those alive at the time of founding, the person must be a "natural born citizen." Indeed, in its further opinion on the Rule 11 Show of Cause matter of March 25, 2009, when the district court withdrew its attempt to impose Rule 11 attorneys' fees and costs in violation of the clear language of the rule the lower court openly said it had no intention of getting into and would not get into this

central issue. Yet it is quite clear that if Col. Hollister could prove any set of facts to support this claim his case should not have been dismissed. The facts that he could have proven to support his claim were clearly alleged in the complaint. There are two ways he could have done this. The district court did not examine either one. We discuss this further later on.

In the first place, however, before we examine those two ways, we point out that the district court was required in order to make the determination that no claim was stated in making the claim of constitutional lack of eligibility, as Col. Hollister did, that the respondent Obama did not meet the definition of this phrase and thus that there would have been a resulting conflict between the respondent Obama and the respondent Biden as far as a claim upon Col. Hollister's obligation as a member of the Individual Ready Reserve, to examine what the framers meant by this phrase. This it did not do and said it had no intention of doing, what it was required to do to meet its obligation imposed as a universal rule by this Court under 12(b)(6) when a dismissal motion is filed. We discuss the question of what the framers intended by the phrase further later in the petition.

In the meantime we discuss two further points about the district court's failure to meet its fundamental obligation when a Rule 12(b) (6) dismissal motion is filed, to analyze and see if there is any set of facts which the plaintiff can prove to support his claims.

IV. Interpleader is an equitable remedy

The first such point is that interpleader is an equitable procedure, both at common law where it is anciently rooted and under the federal statute and/or rule. Thus to simply conclude without proper analysis that a claim is "frivolous" on the basis of interim rulings as the district court did here and as was adopted without any real further analysis by the appellate court is to ignore the principle that equity provides a remedy when there is not remedy at law. In a case so important to the nation as this, where the very ability of the Commander–in–Chief to issue orders is at stake and there is a fundamental question of a person having sought the nation's highest office knowing full well that his constitutional eligibility to occupy the office was at the very least in question this calls for the supervision of this Court.

V. The failure to allow amendment violated Rule 15

Secondly, it must also be noted that the dismissal by the district court in this case, as approved by the appellate court without further analysis, was upon motion under Rule 12(b)(6). The respondents filed no answer, only a motion to dismiss. Therefore, under the law of Rule 12(b) (6) as laid down by this Court and every other federal court, and by Fed. R. Civ. P. 15, no responsive pleading had been filed when the case was dismissed. Further, within 21 days after the respondents filed their motion to dismiss, the plaintiff Hollister filed an amended complaint. The amended complaint added a Bivens count, which the original complaint did not have. The plaintiff was entitled to have that amended complaint accepted and did not have it

accepted. Instead the lower court simply ordered it ignored, stating, in doing so, factually and legally incorrectly, that it did not add anything new. It plainly did add a Bivens count. This was a violation of the clear language of Rule 15, Fed.R.Civ. P. and the universal rule set by this Court in *Foman v. Davis*, 371 U.S. 178 (1962)

Since a Bivens count is used when there is a constitutional violation by a federal officer or officers for which there is not statutory remedy prescribed the district court was required to analyze this Bivens count and did not do so. Even if the interpleader statute did not apply, the Bivens count may have applied. Thus this was a further failure on the part of the district court to carry out its obligations under the universal procedure prescribed by this Court when it undertakes to dismiss a complaint under Rule 12(b)(6). Clearly the plaintiff Hollister could have proven a set of facts that the Constitution was violated if the facts alleged in his amended complaint were taken as true, even if the interpleader statute had not been found, as it was, to give the district court jurisdiction and, thereby, standing to Col. Hollister.

Moreover, another thing that was new in the amended complaint was an attachment of an image of a copy of an actual "long form" Hawaiian birth certificate *circa* 1961 to dramatically illustrate the difference between that form and the computer-generated Certification of Live Birth or COLB form, not technologically available in 1961 that, as alleged in the complaint, was falsely used by the campaign of the respondent Obama to supposedly be a Hawaiian birth certificate and "prove" his birth in

Hawaii. The difference between the images of the two types of documents is quite strikingly clear and is one of the reasons that the popular disbelief in the eligibility of the respondent Obama has grown despite the campaign of suppression and ridicule directed against any who raise the question as was exhibited by the bias of the district court in this case as discussed further below. Under Rule 12(b) (b), the district court was obliged to examine that exhibit in making its decision but clearly did not do so. This violated the universal rule set down by this Court. See *Tellabs, Inc.* and *Leatherman, supra.*

VI. The central natural born citizen issue

With those two points addressed we turn now to the central issue of whether the respondent Obama is a "natural born citizen" within the meaning of Art. II, Sec. 1, Cl. 5 of the Constitution. If the plaintiff Hollister could have shown that the respondent Obama does not meet that eligibility requirement under any set of facts he could prove in support of his claim that the respondent Obama does not meet that requirement then the Rule 12(b) (6) dismissal was an error of fundamental importance to the entire rule of law in this country. If proven true those allegations mean that every command by the respondent Obama and, indeed, every appointment by the respondent Obama, including the appointment of the members of this and every other court may be only *de facto* but not *de jure.* Further his signature on every law passed while he occupies the Oval Office is not valid if he is not constitutionally eligible to occupy that office *de jure.* Thus it is not hyperbole to state that the entire rule of law based on the Constitution is at issue.

Moreover, it would indicate that the respondent Obama ran for the office of President knowing that his eligibility was at the very least in question.

There are two factors that are at issue if the allegations of the complaint are taken as true in relation to the "natural born citizen" eligibility requirement. The first is the location where the person was born. Was it in the United States? The second factor is was the birth in the United States to two parents both of whom were citizens of the United States? The district court was required to examine both of these factors but chose to avoid examining either.

VII. Birth outside the United States

With regard to the first factor:

There were sufficient allegations in both complaints to allege specifically under those allegations that the respondent Obama was born outside the United States and its outlying territories. This is significant because the Constitution, in Art. I, Sec. 8, Cl. 4 gives Congress the power to "establish an uniform Rule of Naturalization...," At the time of the birth of the respondent Obama in 1961 as alleged, Congress had done this in the Immigration and Naturalization Act of 1952. Under the applicable provision of that act, § 301(a)(7) the for the respondent Obama to have been a naturalized citizen of the United States at birth, were he born of one U.S. citizen parent and one alien parent, as he has alleged throughout his political career he was, his mother would have had to have been continuously resident in the United States for a

period of ten years preceding the date of his birth and, most importantly, she would have had to have resided continuously for five years preceding his birth in the United States after she had turned fourteen years old. Since she was only eighteen when Obama was born, this condition was clearly not fulfilled under the allegations of the complaint as they were required to be examined and analyzed under the universal rule of law as set out by the decisions of this Court to which we have referred.

The second part of this inquiry as to the root claim of the plaintiff Hollister in this case concerns the meaning of the constitutional eligibility phrase in Art. II, Sec. 1, Cl. 5. In 1875, in a unanimous decision by this Court that was written by Chief Justice Waite, it was said of this constitutional eligibility phrase, in the context of citizenship as a general concept in a case that was about the state of Missouri not allowing a woman, though she was clearly a citizen, to vote because the franchise in Missouri, by virtue of its state constitution, extended only to men:

> The Constitution does not, in words, say who shall be natural born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural born citizens, as distinguished from aliens or foreigners. Some authorities go further, and include as citizens children born within the jurisdiction without reference to the citizenship of

> their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. *Minor v. Happersett*, 88 U.S. 162, 167-168 (1875)

The *Minor* case, of course, was decided after the adoption of the Fourteenth Amendment and was concerned with the impact of that Amendment upon pre-existing "privileges and immunities" as mentioned in the Constitution prior to its adoption. The conclusion was that those privileges and immunities were not altered by its adoption with the result that states that did not, historically allow women to vote could continue to do so at that time, as woman's suffrage was not a privilege or immunity. The case thus clearly established that to ascertain the meaning of the phrase "natural born citizen" in the Constitution as adopted one had to seek to ascertain the intent of the framers in using the term. It is not a "plain meaning" situation. That attempt was not made by the district court in this case, which is another violation of the standards established by this Court with regard to Rule 12(b)(6) motions.. In fact, as we have pointed out, the district court made clear that it would not even consider the phrase, much less what was intended by its use. One has to resort to the discourse of the day among those who were present at the founding. The *Minor* opinion did make one relevant point clear on his score. It pointed out that the word "citizen" was used by the founders to apprehend those who live in a Republic as opposed to subjects of a

sovereign. It also made the point that what drove the founders in drafting the Constitution was a concern with allegiance to the Republic.

Another 19th century opinion deemed relevant to the issue of the meaning of the Art. II phrase at issue is that of Mr. Justice Story in *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830). As with the *Minor* opinion this case does not concern presidential eligibility. It concerned a dispute over inheritance of land in the situation where two daughters, whose children were competing for shares of their father's land holdings in South Carolina. They were both born in South Carolina of citizens there before the Revolution. One had married a British officer during the British occupation of Charleston and had returned with him to England, there to bear children and die. It's significance for present purposes is that in the opinion, Story, who was one of the giants of our early jurisprudence, made clear the distinction between matters of citizenship being derived from the law of nations rather than what he termed the "municipal" law of the common law. He said:

> The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations

The case was resolved based on the provisions in the treaty between the U.S. and Britain entered into after the war and the provisions it made for such inheritance under municipal or common law principles.

The majority opinion by Story in *Shanks* echoed his concurrence in another opinion handed down by this Court in 1814 which sheds further light on this use and understanding of the law of nations at the founding of the Republic, one in which the majority opinion was by Mr. Justice Bushrod Washington, a cousin of George Washington's and there was an opinion concurring in part and dissenting in part by John Marshall, the only early justice (then Chief Justice) who exceeds Story in stature. The case was *The Venus*, 12 U.S. (8 Cranch.) 253 (1814). Bushrod Washington, in the majority opinion referred to the law of nations as dispositive on the issues of the case and in particular twice cited Vattel as the authority on the law of nations, referring to the 1756 treatise by the Swiss author Emrich de Vattel which was well known to and discussed by the framers. Story stated his "entire concurrence" in the opinion. John Marshall, C.J., concurred in part and dissented in part. In so doing he referred also to Vattel on the law of nations, quoting from his treatise as follows:

> *Vattel*, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my hands, says, "the citizens are the members of the civil society; bound to the society by certain duties, and subject to its authority, they equally participate in its advantages. The *natives*, or *indigenes*, are those born in the country of parents who are

citizens. Society not being able to subsist and perpetuate itself but by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights."

"The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the law, or custom, gives them. The *perpetual inhabitants* are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united and subject to the society, without participating in all its advantages."

Justice Livingston, it should be noted, concurred with the partially concurring and partially dissenting opinion of Chief Justice Marshall. Thus we see that, indeed, these matters of who might be a sort of citizen, such as a natural born one, to persons familiar with the discourse of the time, and members of this Court in particular, were determined by the law of nations, and Vattel was looked to as authoritative in that area and that no less a light than John Marshall saw the phrase, quoting directly from Vattel, as referring to one born in the country of two citizen parents, which the respondent Obama clearly was not. Moreover, we see how important in particular it was that the father be a citizen, and the respondent Obama's

father, by the statements upon which he built his career, was not.

We note that this Court relatively recently has explicitly recognized the importance of Vattel and his Law of Nations in regard to the sort of matters at issue here, among the categories for which he is an important and authoritative reference from the time of the framing. See *Sosa v. Alvarez-Machain.* 542 U.S. 692, 124 S.Ct. 2739 (2004). This opinion acknowledges the awareness of Vattel's work in the constitutional convention.

The petitioners Hollister and Hemenway referred to three other authorities of the time, including Vattel, using the same passage quoted by John Marshall, in their Rule 28(j) letter in the appeals court to show what "natural born citizen" meant in the discourse of the time according to those who were familiar with the framers. (APPX 107 ff) The other authorities cited, Daniel Ramsay and St. George Tucker, were familiar with the framers as can be seen from the letter. Of particular note is the explanation given by St. George Tucker in his commentaries upon the Constitution as it related to Blackstone in his Blackstone of the time at the place cited. He indicates that the concern was founded in the fear of events such as those that had occurred in Europe as a result of European dynastic marriages and certain marriages involving *stadtholders* of Holland. This was a fear that loyalty to the country of a parent would lead to actions not in the best interests of the adopted

It is well established that in the constitutional convention there were discussions of Vattel and his

concepts in his treatise The Law of Nations. Indeed the historian Carl Van Doren records in his book on the framing of the Constitution, citing the annals of the convention, that on one day Mr. Martin of Maryland read so extensively from Vattel and Locke. Priestley and others that other members became quite impatient. See "The Great Rehearsal" p. 121.

Another piece of valuable evidence is a letter that John Jay sent to George Washington shortly before the presidential eligibility qualification was adopted. The letter was sent to Washington from New York on July 25, 1787, and specifically urges that the President as Commander–in–Chief be nothing but, in Vattel's phrase as it was adopted, a natural born citizen. See a copy at:

http://www.familytales.org/dbDisplay.php?id=ltr_joj4101&person=jo. Washington made evident his concern about even commanders in his army with dual allegiances during the war and recorded those concerns in his journals and letters. A "thread" on Vattel and research into the documents and discourse of the time with a great many images of the actual documents including correspondence and newspaper accounts and other sources can be found.

VII. The bias exhibited

The district judge based his decisions, not on the required examination of the complaints that Rule 12(b) (6) mandates but rather on a bias reliant upon extra-judicial factors. The most glaring of these reliances was the following:

> The plaintiff says that he is a retired Air Force colonel who continues to owe fealty to his Commander-in-Chief (because he might possibly be recalled to duty) and who is tortured by uncertainty as to whether he would have to obey orders from Barack Obama because it has not been proven -- to his satisfaction, that Mr. Obama is a native-born American citizen, qualified under the Constitution to be President. The issue of the President's citizenship was raised, vetted, blogged, tested, twittered, and otherwise massaged by America's vigilant citizenry during Mr. Obama's two-year-campaign for the presidency, but this plaintiff wants it resolved by a court.

It is difficult to think of any factor of a judge's decision more extra-judicial. Moreover, it seems to express an outright denial of access to the courts based on that factor. The combination of bias and ridicule of a person like the plaintiff wanting his concerns resolved by a court as being, essentially, an "unthinkable" notion is an expressed denial of a citizens right to access to the courts. It violates a principle set down by this Court. See, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) The district court went on to say:

> The real plaintiff is probably Philip J. Berg, a lawyer who lives in Lafayette Hill, Pennsylvania and who has pursued his crusade elsewhere, see Berg v. Obama, 574 F.Supp.2d 509 (E.D.Pa.2008), invoking the civil rights statutes, the Federal Election Campaign Act, the Freedom of Information Act, the Immigration and Nationality Act, the law of promissory estoppel. That case was the subject of a scholarly opinion by a judge

who took Mr. Berg's claims seriously, and dismissed them. Mr. Hollister is apparently Mr. Berg's fallback brainstorm, essentially a straw plaintiff, one who could tee Mr. Berg's native-born issue up for decision on a new theory; If some "value" could be assigned to the "duties" the plaintiff thinks he might someday be called upon to fulfill under the Commander-in-Chief, then those "duties" could be deposited in the registry of this Court as the res whose distribution is to be decided by a sit in interpleader!

Col. Hollister's DOD form shows that he is a highly decorated career officer in a field calling for exceptional skill and intelligence. Moreover his Military Occupational Specialty was such that being subject to recall is not far fetched. The Individual Ready Reserve is a serious component of our military capability. The mockery and pejorative use of quotes here only illustrates the judge's bias based on his dislike for the counsel of Colonel Hollister, an extraneous factor. This was further evidenced when he referred to lawyers Berg and Joyce, neither of whom he admitted, as "agents provocateurs." In his later opinion on Rule 11 he referenced and gave the URL to Berg's web site with pejorative observations.

The appeals court refused to act upon and correct this bias, even when petitioners moved for recusal under 28 U.S.C. § 455. They relied upon this Court's decision in *Liteky v. United States,* 510 U.S. 540 (1994). Yet the facts in this case are such that to so hold is to stand *Liteky* on its head. Properly applied, it supports recusal here. In that case there had been a trial, and a previous trial involving the same defendant. The claimed bias that was

ultimately rejected was claimed to have derived from the treatment of the defendant in the first trial, which was said to have been disrespectful and from certain remarks to counsel for the defendant, such as admonishing him not to engage in a political crusade in a situation where he announced that his criminal defense would be an attack on the politics of the government. By contrast here there were no proceedings of any kind, not even a hearing much less a trial, or any argument. The factors evidencing the bias from outside any proceeding have been set out. There were pejorative comments and uses of language not based on any observation by the judge. Nor was there any Hitler-type figure involved as mentioned in *Liteky*. Plaintiff Hollister has an unblemished record and character. The behavior of the judge here violates the rule set down by this Court and in cases cited in *Liteky*. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 487, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) *e.g.* The appeals court adopted that bias, incorrectly asserting that the motion was moot.

The appeals court adopted and affirmed everything done by the district judge without independent analysis, the bias included.. It refused, despite motions that it do so, to take judicial notice of the laws of Hawaii governing the public health statistics in question claiming, incorrectly, that they are irrelevant. To the contrary, their laxity and weakness in allowing what was alleged in the complaint is highly relevant. It is a matter of record that the district judge here and the respondent Obama have both held management positions, on boards of the Lawyers Committee for Civil Rights Under Law, and thus are acquainted with each

other. There is every appearance of bias here, bias that was acted upon independently of any opportunity to observe and form conclusions. It is not hyperbole to assert that if this case stands, it will be destructive of the constitutional rule of law.

VIII. The inappropriateness of sanctions

The effect of the bias when balanced with the errors set out above indicate the inappropriateness of Rule 11 sanctions in this case. Under Rule 11, as established by its language and the holdings of this Court, focus is on inquiry made prior to filing.. What is required before filing is a "reasonable inquiry" this Court has universally held. See *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) a case in which it was found that the corporate plaintiff could have found in an hour of pre-filing inquiry that the case was a "mistake." Here the district court made no inquiry whatsoever into what the pre-fling inquiry was.

The district court did not analyze the required prongs set out in the rule, or look into the factual basis, or inquire as to the warrant in law or any good faith extension of law. Yet here the petitioner Hemenway was on the same page as Chief Justices Waite and Marshall. Rule 11 does not indulge bias. When so used it is a threat to the rule of law and in conflict with the universal rule set down by this Court for focus upon reasonable pre-filing inquiry.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 33.1

I HEREBY CERTIFY that the accompanying PETITION FOR WRIT OF CERTIORARI contains 8545 words.

_____

John D. Hemenway

Dated: November 22, 2010